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No. 86-294

In the Supreme Court of the United States

OCTOBER TERM, 1986

GORDON C. PERDUE AND
ELIZABETH T. PERDUE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in holding that a federal employee may not maintain an action under the Federal Tort Claims Act once the employee has sought and obtained benefits under the Federal Employees Compensation Act.

1. Petitioner Elizabeth Perdue, a civilian clerk employed by the United States Army, was injured in an automobile accident on the Army's Fort Gordon, Georgia, military reservation. On the day of the accident, she had been released from work before the end of her normal workday and was driving home when her car collided on the base with a vehicle driven by an Army soldier returning from a party.[1] Mrs. Perdue was seriously injured. Pet. App. A17, A29.

Petitioners, with the assistance of Elizabeth Perdue's work supervisor, then took several affirmative steps to obtain benefits under the Federal Employees Compensation

[1] The Army subsequently determined that the soldier was acting in the line of duty at the time of the accident (Pet. App. A17).

Act (FECA), 5 U.S.C. 8101 *et seq.* First, while still hospitalized for treatment of her injuries, petitioner Elizabeth Perdue signed a Notice of Traumatic Injury form so that she might apply for compensation benefits while away from work (Pet. App. A18). Second, her husband and co-petitioner in this action signed another form for a similar purpose (*ibid.*). Finally, Mrs. Perdue signed additional documents requesting leave without pay status so that she could receive the approved compensation (*ibid*). Her supervisor then filed a compensation claim on her behalf (Pet. 8), and the Secretary of Labor ultimately determined that she should be paid compensation under FECA (see Pet. App. A21 & n.3, A29).

After receiving FECA compensation payments for a period of time (Pet. App. A18), petitioners filed suit against the United States in the United States District Court for the Southern District of Georgia. Petitioners sought damages for personal injuries and property loss under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* The district court held that petitioners' claims were barred by 5 U.S.C. 8116(c), which states that FECA provides the exclusive remedy against the United States for injuries within its coverage (Pet. App. A29-A30). The court reasoned that the Secretary of Labor had determined that petitioner's injuries fell within the scope of FECA and that the Secretary's determination was not subject to judicial review (*ibid.*). Accordingly, the court granted the government's motion to dismiss petitioners' personal injury and property damage claims (*id.* at A30).

The court of appeals affirmed in part and reversed in part (Pet. App. A16-A23). The court held that FECA provides the exclusive remedy once the claimant seeks compensation benefits and the Secretary of Labor concludes that the claimant's injury falls within the coverage of the Act (*id.* at A20-A21). The court noted that petitioners had

sought and obtained compensation under FECA and ruled that the Secretary's decision to pay compensation to petitioners conclusively established that Mrs. Perdue's injuries were covered by the statute (*id.* at A20-A21). Accordingly, the court ruled that petitioners' personal injury claims were barred by FECA and that the district court properly dismissed those claims (*ibid.*). The court of appeals concluded, however, that petitioners' property damage claim was not barred by FECA, and it remanded the case to the district court for further proceedings on that claim (*id.* at A22-A23).

2. Petitioners contend that the court of appeals erred in dismissing their FTCA personal injury suit. That claim was correctly rejected by the court of appeals and does not warrant review by this Court.

The Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, was passed by Congress in 1916 to provide workers' compensation coverage to federal employees. The Act, as amended in 1949, provides the *exclusive* remedy against the United States for a federal worker's employment related injuries. It thus expressly states (5 U.S.C. 8116(c)) that:

> The liability of the United States * * * with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States * * * to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States * * * because of the injury or death in a direct judicial proceeding, in a civil action, or * * * under a Federal tort liability statute.

In *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983), this Court observed that this exclusive liability provision:

> was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act,

> that had been enacted to waive the Government's sovereign immunity. In enacting this provision, Congress adopted the principal compromise—the "*quid pro quo*"—commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government.

It is thus well settled that if a federal employee's injury falls within the scope of FECA coverage, all personal injury actions arising out of an employment relationship with the United States are barred. *E.g., Heilman* v. *United States*, 731 F.2d 1104, 1109 (3d Cir. 1984); *Griffin* v. *United States*, 703 F.2d 321, 322 (8th Cir. 1983).

FECA also provides that the Secretary of Labor has the "final and conclusive" authority to determine whether a given injury is covered by the Act and that his decision is "not subject to review" by any court (5 U.S.C. 8128(b)(1) and (2)).[2] In light of this clear and unequivocal statutory language, the courts of appeals have held that the Secretary's determination that a particular injury is covered by FECA is not judicially reviewable under any circumstances. See, *e.g., DiPippa* v. *United States*, 687 F.2d 14, 16 (3d Cir. 1982) (FECA coverage determination unreviewable); *Gill* v. *United States*, 641 F.2d 195, 197 (5th Cir. 1981) (Secretary's FECA coverage determination unreviewable, notwithstanding plaintiff's allegation that the Secretary's decision was based solely on the desire to

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[2] 5 U.S.C. 8128(b) provides that (emphasis added)):

> The action of the Secretary or his designee in *allowing* or denying a payment under this [FECA] subchapter is—
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

avoid greater liability under Federal Tort Claims Act). Accordingly, the courts of appeals have uniformly held that whenever an employee applies for and receives FECA compensation benefits, the Secretary's decision to award payments cannot be collaterally challenged in a subsequent FTCA action. *E.g., Grijalva* v. *United States*, 781 F.2d 472, 474 (5th Cir. 1986); *Gill* v. *United States*, 641 F.2d at 197; *Joyce* v. *United States*, 474 F.2d 215, 219 (3d Cir. 1973); *Waters* v. *United States*, 458 F.2d 20, 22 (8th Cir. 1972); *Cobia* v. *United States*, 384 F.2d 711, 712 (10th Cir. 1967), cert. denied, 390 U.S. 986 (1968); *Soderman* v. *United States*, 313 F.2d 694, 695 (9th Cir. 1962), cert. denied, 372 U.S. 968 (1963).

Notwithstanding the unreviewability of the Secretary's FECA coverage determination, petitioners argue (Pet. 13) that Mrs. Perdue was not injured in the course of her duties as a federal employee and therefore was not eligible for FECA benefits under 5 U.S.C. 8102(a). The principal basis for this contention is that petitioner had been released from her duties and was driving home at the time of the accident.[3] If petitioners believe that Mrs. Perdue

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[3] While the merits of this issue may not be judicially reviewed, the Secretary's finding here was by no means unprecedented. Questions concerning whether the injury arose in the course of performing duties as an employee turn on the particular facts of each case. Compare, *e.g., Grijalva* v. *United States*, 781 F.2d at 473 (Secretary found that injuries incurred while driving home from work were compensable under FECA); *Avasthi* v. *United States*, 608 F.2d 1059, 1061-1062 (5th Cir. 1979) (injuries incurred while walking to car on the way home raised a substantial question of FECA coverage); *Concordia* v. *United States Postal Service*, 581 F.2d 439, 441-442 (5th Cir. 1978) (injuries incurred while driving home from work raised a substantial question of FECA coverage); with *Bailey* v. *United States ex rel. Department of the Army*, 451 F.2d 963, 967-968 (5th Cir. 1971) (injuries incurred on way home from work did not raise a substantial question); *United States* v. *Udy*, 381 F.2d 455, 458 (10th Cir. 1967) (same).

should not have received FECA benefits, their remedy is to apply to the Secretary to reconsider his decision to award her compensation. See 5 U.S.C. 8128(a)(1) (Secretary may, on application, terminate compensation benefits); *Grijalva* v. *United States*, 781 F.2d at 474.

Petitioners also err in contending (Pet. 14-15) that the decision below conflicts with *Martin* v. *United States*, 566 F.2d 895 (4th Cir. 1977). *Martin* held that the government's unilateral decision to pay compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C. 901 *et seq.*, where the employee "never filed a claim for compensation nor sought an administrative determination of her eligibility for statutory compensation" (*id.* at 898) does not estop the employee from pursuing other remedies.[4] In this case, by contrast, the court of appeals found that petitioners had affirmatively sought to qualify for FECA benefits (Pet. App. A21). The court of appeals distinguished this case from *Martin* on that ground and expressly left open the question whether it would follow *Martin* in a proper case (*id.* at A21 n.2). Moreover, the *Martin* court also recognized that an administrative determination of eligibility would foreclose a subsequent tort suit by a federal employee (566 F.2d at 898 n.4).[5]

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[4] Like FECA, benefits under the LHWCA are the exclusive remedy in those situations where they are available. 5 U.S.C. 8173.

[5] It is thus unclear whether the court in *Martin* based its ruling on the absence of any claim for benefits or on the perceived absence of an administrative finding of eligibility by the Secretary. If the former, *Martin* is plainly distinguishable on the ground that petitioners here clearly filled out the forms necessary to receive FECA benefits, and any claim of involuntariness (Pet. 12-13) of that action should be taken up with the Secretary. If the latter, we think that *Martin* is plainly incorrect, because an administrative determination of eligibility is inherent in any decision to pay benefits.

Finally, petitioners contend (Pet. 15-16) that the court of appeals erred in failing to allow their suit to proceed against the United States under the "dual capacity" doctrine.[6] Petitioners argue that the United States can be held liable in its capacity as employer of the driver of the vehicle that struck Mrs. Perdue. That claim lacks merit. The dual capacity doctrine provides that an employer may be held liable in tort if it possesses a " 'second persona so completely independent from and unrelated to [its] status as employer that by established standards the law recognizes it as a separate legal person.' " *Wright* v. *United States*, 717 F.2d 254, 259 (6th Cir. 1983) (citation omitted).[7] That doctrine does not apply in this case. The fact that the government employs other persons does not invest it with a "second persona" that is completely separate from its role as petitioners' employer.[8] Otherwise, FECA would never apply when one employee is injured by another. The lower courts correctly rejected that claim.

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[6] The court of appeals did not specifically rule on the applicability of the dual capacity doctrine. The district court, however, flatly rejected the argument (Pet. App. A30).

[7] In *Wright*, the plaintiff was an employee of the Veterans Administration (VA) who became ill during working hours. She was admitted as a patient to the VA hospital where she worked, and she was injured during her treatment. The court of appeals concluded that the hospital was serving as her physician, not her employer, at the time of her injuries, and ruled that she could bring suit against the VA under the FTCA. 717 F.2d at 260. This case is readily distinguishable from *Wright*.

[8] Thus, petitioners' reliance (Pet. 16) on *Wallace* v. *United States*, 669 F.2d 947 (4th Cir. 1982), is misplaced. *Wallace* held that the United States could be sued under the FTCA because the United States had assumed liability under the Swine Flu Act of 1976, 42 U.S.C. (1976 ed.) 247b(j)-(*l*), from the manufacturers of the swine flu vaccine. 669 F.2d at 954-955.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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